(1)

04-43 .. JUL 7 - 2004

No. _____

In the Supreme Court of the United States

HING QUAN LUM, ET AL.,

Petitioners,

v.

BANK OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a non-fraud claim (*i.e.*, antitrust conspiracy) is pled in compliance with Rule 8(a), Fed. R. Civ. P., does the existence in the complaint of a related allegation of fraudulent conduct subject the non-fraud claim to dismissal for failure to comply with the "particularity" requirement of Rule 9(b)?

2. Does a complaint alleging a horizontal conspiracy among nationwide banks to inflate a widely used pricing index, in order to create an artificial floor under price competition for consumer lending, adequately allege a *per se* violation of Section 1 of the Sherman Act?

3. Is the term "prime rate" sufficiently well-recognized and definite to support a fraud claim based upon misuse of that term?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners (Hing Quan Lum, Debra Lum, and Gary Oriani) are individuals who entered into credit card agreements, credit line agreements, and home equity loan agreements with one or more of the respondent banks (defendants). The agreements provided for adjustable interest rates based on the national "prime rate" index published in leading financial publications such as *The Wall Street Journal* or *The New York Times*.

Respondents

Respondents (Bank Amer, Citibank NA, Chase Manhattan Bank, Morgan Guaranty Trust Co. of New York, First Union National Bank, Wells Fargo Bank, Fleet Bank, PNC Bank NA, Bank of NY, Key Bank, Bank One Corp, and US Bank) are twelve of the thirty banks whose reported "prime rates" comprise the national "prime rate" index published in leading financial publications such as *The Wall Street Journal* and *The New York Times*. Respondents are alleged to have conspired to inflate the "prime rate" index, as a means of artificially elevating the finance charges paid by their customers under "prime rate"-based lending agreements.

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STATEMENT OF JURISDICTION

The judgment of the Third Circuit was entered on March 11, 2004. On April 9, 2004, that court denied a timely petition for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions.

Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The RICO Act, 18 U.S.C. § 1962(d), which provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Overview of the Case

The allegations that form the factual backdrop of this case are simple. Respondents are twelve leading banks that entered into thousands of variable-rate credit agreements with petitioners and other customers. The variable interest rates were tied to the national "prime rate" indexes. By reporting arbitrary, inflated interest rates as their "prime rates," respondents in effect rigged the national "prime rate" indexes published by leading financial publications so that the indexes did not represent a competitively-based floor on interest rates, but rather an artificially inflated floor. As a result, respondents have been able to collect hundreds of millions, if not billions of dollars in excess interest charges.

The "prime rate" indexes are based on respondents' own prime rates, as reported by respondents to leading national financial publications. The interest rates charged by respondents in connection with their "prime rate"- based

lending are computed on the basis of a formula such as "prime +1%" or "prime +2%," where "prime" is the "prime rate" index published in a designated financial publication. Unbeknownst to petitioners and the other customers, for at least the last twenty years respondents have conspired to inflate these indexes by misreporting their prime rates to the financial publications that publish the indexes, in order to artificially increase their customers' finance charges.

Less than two months ago, this Court recognized the "prime rate" as the "financial market's estimate of the rate a commercial bank should charge a creditworthy commercial borrower . . . ." *Till v. SCS Credit Corp.*, 124 S.Ct. 1951, 1961 (2004). The Court further stated that the "prime rate" is an "objective," "easily ascertainable" rate that approximates the "riskless," or "pure rate" for money. *Id.* at 1967 n.2, 1972. Clearly, it is for these reasons that the term "prime rate" has historically been considered to be representative of the rates charged by banks to their largest and most creditworthy commercial borrowers, i.e., the lowest and best rates available in the commercial lending market at any given time. See, e.g., *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1435-1436 (7th Cir. 1994), and cases cited therein.

Since the time their conspiracy began, however, in the early 1980's, the "prime rates" respondents have reported to the financial publications, which those publications in turn used to compute their national "prime rate" indexes, have been bogus. They have not reflected the low interest rates that respondents actually charged, or anticipated charging their creditworthy commercial borrowers (*i.e.*, their *true* prime rates), or, for that matter, any other objectively

verifiable or competitively-based interest rates.[1] Instead, respondents admitted to the district court below that they establish and report their "prime rates" on an arbitrary basis because, as far as they are concerned, the term "prime rate in a sense is meaningless" and merely represents a "starting point," "above which the banks then compete." Tr. 14:11-15:2.

Petitioners sued respondents individually, and on behalf of a proposed class of thousands of borrowers nationwide, seeking to recover the hundreds of millions of dollars in excess interest charges attributable to respondents' bogus, artificially inflated "prime rate" indexes.[2]

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[1] For example, when the interest rate respondents actually charged, or anticipated charging to their creditworthy commercial borrowers was 5%, respondents reported their "prime rates" to the leading financial publications as 7.5%, thereby inflating the "prime rate" index by 2.5%. Under this example, if a credit agreement provided for "prime +2%" as the interest rate to be charged, respondents collected finance charges 2.5% higher than petitioners otherwise would have been required to pay.

[2] The bogus "prime rates" reported by each respondent throughout their alleged conspiracy have been virtually identical to one another, to within one one-hundredth of a percent. The spread between respondents' bogus "prime rates" and objectively verifiable rates reflecting the true cost of money during the conspiracy period, such as the "fed funds rate," has consistently increased over the past twenty years. For example, in 1987, the spread between the national "prime rate" index and the "fed funds rate" was approximately .5%. App. 43a. By 2000, that spread had increased to approximately 3.0%, a *six-fold* increase over a thirteen-year period. *Id.* Even as respondents artificially inflated their "prime rates," they began charging their creditworthy commercial customers *lower* rates tied to the London Interbank

B. Proceedings Before the District Court

Petitioners asserted claims based on Section 1 of the Sherman Act, 15 U.S.C. § 1, and the RICO Act, 18 U.S.C. §§ 1962(c) and (d).[3] They alleged that respondents entered into a conspiracy to artificially inflate, manipulate, and control the "prime rate" indexes. Petitioners also alleged that respondents misreported their "prime rates" to the national financial publications as part of their conspiracy to create an artificially inflated floor for petitioners' "prime rate" – based lending. Respondents moved to dismiss these claims under Rule 12(b)(6).

Acknowledging that "the pleading requirements of Rule 9(b) do not apply to a conspiracy claim under the Sherman Act," the district court nevertheless ruled that petitioners were "wrong in asserting that the same relaxed standards apply to conspiracy claims as to all non-fraud claims." App. 35a. Concluding that petitioners had "failed to plead conspiracy even with the relaxed degree of specificity required," the court dismissed petitioners' antitrust conspiracy claims. *Id.* at 35a-36a. The court dismissed the RICO claims based on petitioners' failure to satisfy the "particularity" requirement of Rule 9(b). *Id.* at 37a-39a. It also denied petitioners' request for leave to amend their complaint, concluding that it would be futile because "extended oral argument failed to elicit any greater degree of particularity ...." *Id.* at 39a.

Offering Rate ("LIBOR"). The spread between LIBOR rates and respondents' reported "prime rates" also increased dramatically during the conspiracy period. App. 44a.

[3] Petitioners also asserted claims based on state law, but the district court dismissed them pursuant to 28 U.S.C. § 1367(a)(3), without addressing their merits.

C. Proceedings Before The Court of Appeals

Eleven days before oral argument, the Third Circuit notified the parties to be prepared to address at oral argument (1) whether petitioners' "anti-trust [complaint], alleging financial fraud and misrepresentation involving prime rate based lending" must comply with Rule 9(b), and (2) if so, whether petitioners' complaint complied with that rule.[4]

These issues proved decisive. Contrary to the district court's conclusion that Rule 9(b) did *not* apply to petitioners' antitrust conspiracy claims (App. 35a), the court of appeals held that even though the antitrust claims were pled in compliance with Rule 8(a), because petitioners alleged fraudulent conduct in support of those claims, Rule 9(b) was applicable. App. 5a-6a, 21a-22a. The court of appeals then proceeded to affirm the dismissal of the antitrust claims for failure to comply with the "particularity" requirement of Rule 9(b). *Id.* at 22a.

The Third Circuit also affirmed the dismissal of the RICO claims on the same basis, and on the further ground that "prime rate" is an "indefinite," "imprecise," and "equivocal term," making it "unreasonable to infer" that defendants' use of that term was "reasonably calculated to deceive persons of ordinary prudence and comprehension...." *Id.* at 17a-18a.

Finally, the Third Circuit affirmed the district court's denial of petitioners' request for leave to amend their antitrust

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[4] Prior to that notice, respondents had not contended either in the district court or on appeal that the antitrust conspiracy claim was subject to dismissal for failure to satisfy the "particularity" requirement of Rule 9(b). The court's notice did not invite any briefing on this issue. App. 45a.

claim. The court held that, because respondents competed above the "prime rate" floor their alleged conspiracy created, and petitioners did not allege that there was "parallelism in the final interest rates charged," no relief permitted by Section 1 of the Sherman Act could be granted under "any set of facts" consistent with petitioners' allegations. *Id.* at 29a-30a. In reaching this conclusion, the Third Circuit did not consider any evidence or expert testimony regarding the actual effect of respondents' conspiracy on interest rates charged in connection with "prime rate"-based lending. *Id.*

REASONS FOR GRANTING THE PETITION

The lower federal courts have expanded Rule 9(b) far beyond its boundaries, undermining Supreme Court decisions that established the primacy of Rule 8(a). A judge-made pleading doctrine known as the "sounds in fraud" doctrine has played a significant role in this development. (See Sections A & B, *infra*.). The Court's intervention is needed to restrict the use of this doctrine, to re-establish the primacy of Rule 8(a) and the limited applicability of Rule 9(b), and to guide the lower courts in applying both. It is also needed to reaffirm the Court's landmark ruling in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), a cornerstone of antitrust law that has effectively been overruled by the decision below (Section C, *infra*), and to ensure the stability and integrity of the vital "prime rate" index. (Section D, *infra*).

A. The Third Circuit's Application Of Rule 9(b) To Petitioners' Antitrust Conspiracy Claim Conflicts With The Decisions Of This Court And Of Other Circuits.

Rule 8(a) provides that a pleading setting forth a claim for relief "shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief ...." Rule 9(b) provides in relevant part that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

This Court consistently has rejected attempts to apply a heightened pleading standard outside the boundaries of Rule 9(b). *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (1993); *Swierkiewicz v. Sorema*, 534 U.S. 506, 512-515 (2003). In *Swierkiewicz*, the Court reiterated an observation first made in *Conley v. Gibson*, 355 U.S. 41 (1957) and repeated in *Leatherman*: "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and *not by judicial interpretation*.'" *Swierkiewicz*, *supra*, 534 U.S. at 515 (emphasis added). By limiting Rule 9(b)'s "particularity" requirement to averments of "the circumstances constituting fraud or mistake," the Court's decisions have established the primacy of the simplified "notice pleading" standard of Rule 8(a) and reaffirmed its applicability to all claims and averments not constituting fraud or mistake. *Leatherman*, 507 U.S. at 168; *Swierkiewicz*, 534 U.S. at 513.

At issue in this case is the applicability of Rule 9(b) to *non-fraud* claims that comply with Rule 8(a)'s "notice pleading" standard, when *non-essential* fraud allegations are asserted in support of those claims. This case highlights the

well-developed split among the circuits that have addressed this common pleading scenario.

The first claim asserted in the complaint in this case was a non-fraud claim for antitrust conspiracy. Significantly, the Third Circuit affirmatively concluded the antitrust claim was pled in compliance with Rule 8(a). App. 6a, n.2. Instead of reversing its dismissal based on that conclusion, however, the Third Circuit applied Rule 9(b) to the antitrust claim, holding that this was warranted because there were fraud allegations related to the claim in one paragraph of the complaint. It then affirmed dismissal of the antitrust claim by reason of its failure to comply with Rule 9(b)'s "particularity" requirement, even though the fraud allegations in the complaint, central to the RICO claims (*see* Section D, *infra*), did not comprise an essential element of the antitrust claim.[5]

1. The "Sounds In Fraud" Line of Cases

The Third Circuit first addressed the applicability of Rule 9(b) to non-fraud claims that contain non-essential fraud allegations in *Shapiro v. UJB*, 964 F.2d 272, 288 (3d Cir. 1993). It held that Rule 9(b) applies to a claim "grounded in fraud," even if fraud is not a "necessary element" of the claim. *Id.* This has become known as the "sounds in fraud" doctrine – a "rule" of pleading that is strictly a matter of judicial interpretation. Under this doctrine, the presence of a non-essential fraud averment in a non-fraud claim, or the mere presence of a fraud allegation elsewhere in the same

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[5] It is unnecessary to allege or prove fraud or any other form of misrepresentation to establish a claim under Section 1 of the Sherman Act. Moreover, Rule 9(b) makes no mention of pleading antitrust liability under Section 1 of the Sherman Act with particularity.

complaint, subjects the entire non-fraud claim to dismissal, pursuant to Rule 9(b), if the fraud allegation is not pled with particularity.

Earlier this year, the Second Circuit adopted this view in *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004), noting other circuits that appeared to have done the same, albeit some in dicta. *Id.* at 170, including n. 5 (citing *Shapiro*, *supra* (applying Rule 9(b) to a non-fraud claim "grounded in fraud"), *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) (applying it to a non-fraud claim "'based on fraud'"), *In re Stac Elecs. Secs. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir. 1996) (applying it to non-fraud claims "grounded in fraud"), *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (dictum applying it to a non-fraud claim "premised on fraud"), *Melder v. Morris*, 27 F.3d 1097, 1100 n. 6 (5th Cir. 1994) (dictum applying it to non-fraud claims "grounded in fraud"), and *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996) (dictum applying it to non-fraud claims based on "a unified course of fraudulent conduct")).

2. The "Surplus Fraud" Line of Cases

Several other circuits have categorically rejected the "sounds in fraud" doctrine, opting instead for what may be called a "surplus fraud" analysis of non-fraud claims containing non-essential fraud allegations.

The "surplus fraud" line of cases includes the Eighth Circuit's decision in *In re NationsMart Corp. Secs. Litig.*, 130 F.3d 309, 314 (8th Cir. 1997). As in this case, a non-

fraud claim was supported by allegations of both fraudulent and non-fraudulent conduct. The Eighth Circuit reasoned that:

> "...a pleading standard which requires a party to plead particular facts to support a cause of action that does not include fraud or mistake as an element comports neither with Supreme Court precedent nor with the liberal system of 'notice pleading' embodied in the Federal Rules of Civil Procedure."

130 F.3d 309, at 315.

The court in *NationsMart* noted that, in averring fraud in the first place, the plaintiffs had "alleged more than was necessary to recover" under the non-fraud claim they asserted. *Id.* Thus, the Eighth Circuit treated the plaintiffs' fraud allegations as "mere surplusage" and held that the failure to plead fraud with particularity did not subject the entire non-fraud claim to dismissal. *Id.*

The Fifth Circuit employed the same analysis in *Lone Star Ladies Inv. Club v. Schlotzky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001). Distancing itself from a footnote in an earlier Fifth Circuit decision that appeared to embrace the "sounds in fraud" doctrine, *see Melder, supra*, 27 F.3d at 1100 n. 6, the court in *Lone Star* stated that there was no justification for dismissing a non-fraud claim that could stand on its own without the "deficient allegation of fraud ...." *Lone Star*, 238 F.3d at 368. In contrast to the Third Circuit's decision in this case and the other circuit decisions embracing the "sounds in fraud" doctrine, the Fifth Circuit in *Lone Star* observed that:

> "[t]he price of impermissible generality is that the [fraud] averments will be disregarded. Where

> averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated."

238 F.3d at 368 (footnotes omitted).

In *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-1105 (9th Cir. 2003), the Ninth Circuit adopted the same "surplus fraud" analysis used in *NationsMart* and *Lone Star*. *Vess* involved the applicability of Rule 9(b) to a diversity action consisting of non-fraud claims, including negligent misrepresentation and negligent failure to warn, and fraud claims. The Ninth Circuit stated that when, as in this case, a non-fraud claim is supported by both fraud and non-fraud allegations, the proper procedure is to disregard any surplus fraud allegations that do not comply with the particularity requirements of Rule 9(b) and allow the non-fraud claim to proceed as long as the "notice pleading" standard of Rule 8(a) is satisfied. *Id.* at 1105.[6] Yet, as further evidence of the confusion on this issue, and the need for the Court's review, in *Vess* the Ninth Circuit did not overrule its earlier holding in *In re Stac*, 89 F.3d 1399, one that reached a contrary conclusion. *Id.* at 1404-1405. Instead, it distinguished *Stac* as a case where the application of Rule 9(b) to a non-fraud

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[6] See also *Sherman v. Network Commerce, Inc.*, 2004 U.S. App. LEXIS 6564 (9th Cir., April 5, 2004) (reversing the dismissal of non-fraud claims under Rule 9(b), so that the district court could consider, in light of *Vess*, whether the non-fraud allegations were sufficient to state a claim for relief if the inadequate fraud allegations were disregarded).

claim was justified because the complaint asserted a "unified fraudulent course of conduct." *Vess*, 317 F.3d at 1106.

Aside from this effort in *Vess* to "straddle the fence," the reasoning employed and the results reached in the "surplus fraud" cases conflicts sharply with the "sounds in fraud" decisions, in which the presence of a deficient fraud allegation in a non-fraud claim was deemed sufficient to scuttle the entire claim. Only the "surplus fraud" decisions heed this Court's admonition in *Swierkiewicz* that, regardless of the nature of the non-fraud claim at issue, it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits" of his claim. *Swierkiewicz*, 534 U.S. at 511-12. By contrast, those circuits that have adopted the "sounds in fraud" approach appear to interpret the Court's holdings in *Swierkiewicz* and *Leatherman* narrowly, as precluding application of a heightened pleading standard to non-fraud claims *only* in the areas of civil rights and employment law. See, e.g., *Muti v. Schmidt*, 96 Fed. Appx. 69, 76 (3d Cir. April 21, 2004), and cases cited therein.

Most importantly, however, it is impossible to reconcile the "sounds in fraud" line of cases, which hold that, when a non-fraud claim is supported by allegations of both fraudulent and non-fraudulent conduct, the entire non-fraud claim is subject to dismissal if the fraud averments do not satisfy Rule 9(b)'s "particularity" requirement, with the "surplus fraud" line of cases, which call for disregarding surplus fraud allegations in assessing non-fraud claims, and instead assessing those claims under Rule 8(a)'s lenient pleading standard.

Given the common practice throughout the country of pleading fraud and non-fraud claims side by side in the same complaint, the harshness of routinely applying Rule 9(b) to non-fraud claims cannot be overstated. Under the Third Circuit's draconian approach in this case, mere reference to "fraud" in an allegation is enough to trigger application of Rule 9(b) to every non-fraud claim potentially touched by that allegation and, if the Rule is found to be unsatisfied, dismissal of each such claim. In addition to granting certiorari to resolve the deep-seated conflict among the circuits on this important issue, the Court should take this opportunity to eliminate application of Rule 9(b) to non-fraud claims – a practice that has proceeded unabated in the Third Circuit and other circuits for years – and to reaffirm that Rule 8(a) furnishes the only pleading standard applicable to non-fraud claims in *every* area of the law not specifically mentioned in Rule 9(b), regardless of the presence of surplus fraud allegations.

B. The Third Circuit's Application Of Rule 9(b) To An Antitrust Conspiracy Claim Underscores The Dangers Of The Judicially Created "Sounds In Fraud" Doctrine.

In holding that the antitrust conspiracy claim in this case was deficient for failure to comply with the "particularity" requirement of Rule 9(b), the Third Circuit decision fundamentally misapprehends, misapplies, and overextends that Rule. It requires a plaintiff to plead particular facts to support a cause of action (*i.e.*, antitrust conspiracy) that does not include fraud as a necessary element. App. 22a. But the decision does more than mandate that plaintiffs state the non-essential fraud averments with particularity. It blurs the distinction between the fraud averments that are not essential to the cause of action and the non-fraud averments that are,

requiring not only that the former, but also that at least some of the latter, be stated with Rule 9(b) particularity.

The end result was that the Third Circuit applied Rule 9(b) to fraud *and non-fraud* allegations asserted in support of the antitrust conspiracy claim.[7] It affirmed the dismissal of the non-fraud claim for failure to state with particularity "circumstances constituting fraud" *as well as circumstances never meant to constitute fraud*. For example, the Third Circuit cited petitioners' failure to state with particularity "whether there was any consistency among the defendant banks in the amount by which the prime rate was falsely reported." App. 23a. If alleged as fact, such consistency would not constitute an essential element of a hypothetical fraud claim warranting application of Rule 9(b). If anything, it would pertain to the non-fraud elements of petitioners' antitrust conspiracy claims, such as the existence of the alleged antitrust conspiracy and the propriety of class certification, to which Rule 9(b) should have no application.

Prior to this case, the "sounds in fraud" doctrine largely had been confined to cases involving non-fraud claims requiring proof of some form of unintentional misrepresentation, on the theory that the nonessential fraud allegations demonstrated that intentional misrepresentation (i.e., fraud) was really the essence of the non-fraud claim, and application of Rule 9(b) was warranted on that basis. See, e.g., *Shapiro v. UJB*, 964 F.2d 272, 288. In this case,

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[7] Unlike other circuit decisions that have been careful to clarify that Rule 9(b) applied only to fraud allegations within a non-fraud claim, the Third Circuit indicated that the entire antitrust conspiracy claim is subject to Rule 9(b). App. 21a-22a. Indeed, the court stated that the presence of a fraud allegation meant that the entire "Amended Complaint is subject to Rule 9(b)." *Id.* at 21a.

however, by applying that doctrine to an antitrust conspiracy claim, the Third Circuit in effect extended it to non-fraud claims that do not require proof of *any* form of misrepresentation as an element of the claim. This case highlights the danger of turning this ill-conceived doctrine loose on the widening spectrum of non-fraud claims that contain non-essential fraud averments.

As noted above, the circuits were sharply divided on how to address this common pleading scenario and were in need of this Court's guidance long before the Third Circuit's extension of this doctrine to antitrust claims, and its unwarranted application of Rule 9(b) to non-fraud averments within those claims. The Court's intervention is even more timely and urgent now that the Third Circuit has rendered this decision extending the "sounds in fraud" doctrine even further.

This Court has noted on several occasions that the need for a simplified pleading standard is particularly important in connection with antitrust claims, where "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broadcasting Sys. Inc.*, 368 U.S. 464, 473 (1962). In antitrust cases, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly...." *Hospital Bldg. Co. v. Trustees*, 425 U.S. 738, 746 (1976). The Third Circuit's decision to extend the judge-made "sounds in fraud" pleading doctrine to antitrust conspiracy claims is in direct conflict with these well-settled principles. The court of appeals did not consider any evidence or expert testimony in reaching its decision in this case, and it did not provide any opportunity for discovery. Instead, the court of appeals acted as judge, jury, and economic expert in analyzing and disposing of petitioners'

antitrust conspiracy claim before any merits discovery could take place.

This willingness to decide the complex economic issues inevitably presented by such a claim, on the basis of the pleadings alone, stands in stark contrast to the restrained approach counseled by the Seventh Circuit in *In Re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003), a case also involving claims under Section 1 of the Sherman Act, based on a price-fixing scheme designed to create an artificial floor under price competition. In that decision, Judge Posner noted the limitations of courts in analyzing the economic impact of complex price-fixing conspiracies without the benefit of expert testimony, observing that resolving the issue of a conspiracy's alleged effect on final prices "requires a knowledge of statistics judges do not possess." *Id.* at 660-661.

As this case demonstrates, Rule 9(b) is being invoked in a growing range of contexts. *See* Wright & Miller, *Federal Practice and Procedure: Civil 2d* (1990 ed.) § 1296, p. 582. Unless application of Rule 9(b) is cabined and well-defined, it will continue to be used to undermine Rule 8(a) and the Court's decisions in *Leatherman* and *Swierkiewicz*.

In the absence of guidance from the Court, differences have emerged among the lower courts not only as to when Rule 9(b) applies, but also as to what must be pled to satisfy its "particularity" requirement, a situation that this Court has not yet addressed, and which has led to unfair dismissals as well.[8] For example, *Haroco, Inc. v. American Nat'l Bank &*

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[8] Wright & Miller, *Federal Practice and Procedure: Civil 2d* (1990 ed.) § 1296, p. 582.

Trust Co., 38 F.3d 1429 (7th Cir. 1994), *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988), and *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522 (9th Cir. 1987), are all "prime rate" fraud cases involving allegations almost identical to those asserted here. Only the Third Circuit's decision in this case concluded that Rule 9(b), Fed. R. Civ. P. was not satisfied by the directly analogous allegations presented.

Despite minor differences, none of these cases required what the Third Circuit did in this case, such as a specific allegation as to how fraudulent statements were communicated to non-parties who merely were unknowing conduits for those statements (*e.g.*, the financial publications). App. 22a-23a.

In this case, petitioners provided respondents with voluminous detail in their complaint and RICO Case Statement, including specific dates respondents reported bogus "prime rates" to the news and wire services, the bogus "prime rates" that they reported, and the specific dates of mailings to petitioners misrepresenting those bogus rates as their "prime rates." Additionally, respondents' Rule 12(b)(6) motion in response made it abundantly clear they were well aware of the precise misconduct with which they were charged. Indeed, they conceded that petitioners' allegations were true, *i.e.*, that for at least twenty years the "prime rates" reported to the leading financial publications that used them to compute and publish the "prime rate" indexes have been arbitrary, "meaningless" rates that did *not* reflect the rates respondents charged their creditworthy commercial borrowers. (Tr. 14:11-15:2). Given that petitioners obviously apprised respondents of the precise misconduct with which they were charged, the Court should make clear that Rule 9(b) requires no more, even if properly applied to some averments in the complaint.

C. Because It Completely Disregards This Court's Landmark Price-Fixing Decision In *United States v. Socony-Vacuum Oil Co.*, The Third Circuit Decision Threatens To Undermine One Of The Cornerstones Of Antitrust Law. *Socony-Vacuum* Should Be Reaffirmed.

In its landmark ruling in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court established principles of antitrust law that have remained inviolate for more than sixty years. In *Socony-Vacuum*, the Court held that the concerted activity of competitors in creating an artificial floor under price competition constituted a violation of Section 1 of the Sherman Act despite the fact that their price-fixing scheme did not eliminate all competition and did not result in uniform final prices. *Id.* at 219-24.

The Third Circuit disregarded *Socony-Vacuum*, one of the key building blocks of antitrust law, despite its striking factual and legal similarities to this case. Contradicting *Socony-Vacuum*, the court of appeals held that, because respondents competed above the "prime rate" floor that their alleged conspiracy created, and petitioners did not allege that there was "parallelism in the final interest rates charged," no relief permitted by Section 1 of the Sherman Act could be granted under "any set of facts" consistent with petitioners' allegations. App. 29a-30a.

Like this case, *Socony-Vacuum* involved a price-fixing scheme designed to place an artificial floor under price competition. *Id.* at 220. The defendants, the nation's major oil producers, entered into a conspiracy to place an artificial floor under the "spot price" for gasoline, which, like the "prime rate," is not the final price, but a base price by which the final price is set. *Id.* As in this case, the defendants

artificially inflated that base price, which was then published in the trade journals. *Id.* at 168. The price-fixing scheme in *Socony-Vacuum* did not eliminate all competition, nor was that the conspirators' intention. *Id.* at 220. It was a scheme among horizontal competitors that did what it was intended to do, establish an artificial floor and thereby remove as a market factor the lowest tier of prices for the commodity. *Id.*

In *Socony-Vacuum*, this Court concluded that the plaintiffs stated a claim under Section 1 of the Sherman Act, despite "the fact that sales on the spot market were still governed by some competition," because "the placing of a floor under the spot market obviously reduced the play of the forces of supply and demand...." *Id.* Here, by respondents' own admission their "prime rates" are not established by competition, but instead are arbitrary and "meaningless," representing merely a "starting point ... *above which* the banks then compete." Tr. 14:11-15:2 (emphasis supplied). This "artificial floor" satisfies *Socony-Vacuum*. The Third Circuit has not simply misapplied or disregarded *Socony-Vacuum*. In effect, it has overruled it, holding that competition above the artificial floor defeated a Section 1 claim and that there could be no claim of "conscious parallelism" absent parallelism "in the final price consumers pay." App. 30a.[9]

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[9] The Third Circuit decision also disregarded the overwhelming body of case law attesting to the continued viability of *Socony-Vacuum* on these very issues. See, e.g. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F. 3d 1217, 1221-1222 (7th Cir. 1993) (relying on *Socony-Vacuum*, and observing that price-fixing agreements need not include "explicit agreement on prices to be charged"); *USA Petroleum Co. v. Atlantic Richfield Co.*, 972 F.2d 1070, 1075, 1083 (9th Cir. 1992) (relying on *Socony-Vacuum* for the proposition that "[p]rice-fixing agreements may or may not be aimed at complete elimination of price competition.... They are all

The Third Circuit's decision also is directly at odds with other circuits' decisions regarding the effect of an agreement by oligopolists to utilize "list prices" or "base prices" to establish an artificial floor, as a means of limiting price competition. For example, in the Seventh Circuit's recent decision in *In Re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, *cert. denied*, 537 U.S. 1188, reversing the summary judgment entered against the plaintiffs, Judge Posner stated as follows:

> An agreement to fix list prices is ... a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices. Anyway sellers would not bother to fix list prices if they thought there would be no effect on transaction prices.... [T]he list price is usually the starting point for the bargaining and the higher it is (within reason) the higher the ultimately bargained price is likely to be. The defendants acknowledge that their "price lists served a useful purpose." The only useful purpose they might serve is as a guide to likely transaction prices....

High Fructose, 295 F.3d at 656.

By disregarding *Socony-Vacuum* and its progeny, the Third Circuit decision undermines a cornerstone of antitrust law, on which this Court and the lower courts have constructed the principles governing price-fixing claims under Section 1 of the Sherman Act for more than half a century. The Court should grant certiorari and reaffirm *Socony-Vacuum*.

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banned because of their actual or potential threat to the central nervous system of the economy.").

D. The Third Circuit's Conclusion That The Term "Prime Rate" Is Too Indefinite, Imprecise, And Equivocal To Support Petitioners' Fraud Allegations Conflicts With This Court's Recent Decision In *Till* And With Decisions Of Several Other Circuits. The Court Should Settle The Issue To Ensure The Stability And Integrity Of The Vital "Prime Rate" Index.

The Third Circuit's decision concludes that the term "prime rate" is too ambiguous to support a fraud allegation.[10] Other circuits disagree. *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1436 (7th Cir.); *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 679, n.8 (6th Cir.); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 528 (9th Cir.).[11] Whether right or wrong – petitioners submit it is wrong – the Third Circuit's conclusion on this point should be addressed immediately because it is critical to the functioning of the American economy and to the consistent administration of federal substantive law that the

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[10] The Third Circuit stated that the "meaning of the term 'prime rate' lies at the heart of this appeal." App. 4a. It held that the term is so "indefinite," "imprecise," and "equivocal" that it "is reasonable for the parties to have different understandings of its meaning," and, therefore, the fact that for at least twenty years respondents have reported arbitrary, inflated rates as "prime rates" instead of their true prime rates "cannot rise to the level of fraud." *Id.* at 18a.

[11] In these decisions, the Seventh, Sixth, and Ninth Circuits recognized the term "prime rate" as sufficiently definite to support fraud claims based on facts strikingly similar to petitioners' allegations.

unambiguous meaning of the term "prime rate" be recognized in all federal courts.

The Court's recent decision in *Till* underscores the need for guidance on this issue. In *Till*, the Court adopted a "prime-plus" formula approach for computing interest rates on "cramdown" loans in all Chapter 13 bankruptcy proceedings. The terms used to describe the "prime rate" in *Till's* plurality, concurring, and dissenting opinions confirm its acceptance as an objectively verifiable standard within the financial world. *Till*, 124 S.Ct. at 1961, 1967 n.2, 1972 (*e.g.*, "financial market's estimate of the rate a commercial bank should charge a creditworthy commercial borrower," "closely approximating the riskless or pure rate for money," "objective," "easily ascertainable," "indisputably...low"). By prescribing a "prime-plus" formula approach, *Till* guarantees greater reliance than ever by consumers, businesses, attorneys, and courts on the "prime rate" index.

Respondents' reported "prime rates" serve as the basis for the national "prime rate" index, which unquestionably is central to the American economy. The prime rate also is increasingly relevant to an ever-widening universe of litigation. Given the centrality of the "prime rate" index, it is not in the national interest that the meaning of "prime rate" be left in doubt, as the Third Circuit decision has done. Nor does it serve the nation's interest in "prime rate" certainty to give banks free rein to continue manipulating the "prime rate" index for their own enrichment, instead of requiring them to report their prime rates honestly. The Court can ensure the necessary integrity and stability of the "prime rate" index by granting certiorari, settling the circuits' disagreement over the meaning of "prime rate," and ending respondents' flagrant manipulation of that index.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Petition be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4348

[Filed April 12, 2004]

HING Q. LUM; DEBRA LUM, husband and wife, individually and on behalf of all persons similarly situated; GARY ORIANI,
Appellants,

v.

BANK OF AMERICA; CITIBANK, N.A.; CHASE MANHATTAN BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK N.A. ; THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; JOHN DOES, ONE THROUGH 100,
Appellees.

Before: SCIRICA, Chief Judge, SLOVITER NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and FISHER, Circuit Judges

ORDER

The petition for rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: April 9, 2004
SLC/cc: G. Martin Meyers, Esq.
William T. Marshall, Jr., Esq.
William E. Deitrick, Esq.
Joseph L. Buckley, Esq.
Peter E. Greene, Esq.
Gregory R. Haworth, Esq.
Brian J. McMahon, Esq.
Anthony P. La Rocco, Esq.
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Mark S. Melodia, Esq.
Allen E. Molnar, Esq.
Darryl J. May, Esq.
Richard H. Klapper, Esq.
Kenneth N. Laptook, Esq.
Frederick A. Nicoll, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 01-4348

[Filed March 11, 2004]

HING Q. LUM; DEBRA LUM,
husband and wife, individually and
on behalf of all persons similarly situated;
GARY ORIANI

v.

BANK OF AMERICA; CITIBANK, N.A.;
CHASE MANHATTAN BANK; MORGAN
GUARANTY TRUST CO.; FIRST UNION
NATIONAL BANK; WELLS FARGO BANK, N.A.;
FLEET BANK; PNC BANK N.A.; THE BANK OF
NEW YORK; KEY BANK; BANK ONE ;
U.S. BANK; JOHN DOES, ONE THROUGH 100
Hing Q. Lum, Debra Lum, and Gary S. Oriani,
Appellants

JUDGES: Before: SLOVITER, ALITO and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

The meaning of the term "prime rate" lies at the heart of this appeal. Plaintiffs, Hing Q. Lum, his wife Debra, and Gary Oriani have borrowed money from defendant banks pursuant to lending agreements with "prime plus" interest rates. Plaintiffs claim in their Amended Complaint that the defendant banks, in setting "prime plus" interest rates, have violated the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), § 1962(d). The banks allegedly violated the Sherman Act by agreeing to misrepresent that "prime rate" is the lowest rate available to their most creditworthy borrowers, when in fact they have offered some large borrowers financing at interest rates below prime rate; they allegedly gave false information about their "prime rate" both to consumers who were seeking credit and to leading financial publications, such as the *New York Times* and the *Wall Street Journal*, which publish independent indices of the prime rate. The banks allegedly violated RICO by making these misrepresentations about "prime rate" through the mails and over interstate wires. Plaintiffs claim that the fraudulently inflated "prime rate" has resulted in their being charged higher interest than permitted by the terms of the "prime plus" loan agreements.

The District Court dismissed plaintiffs' RICO claim because it lacked the specificity in pleading fraud that is required under Fed. R. Civ. P. 9(b). It dismissed the antitrust claim for failure to meet the minimum standards for pleading an antitrust conspiracy. *Lum v. Bank of America*, 2001 U.S.

Dist. LEXIS 25178, No. 00-223, slip op. at 11-12, (E.D. Pa. Nov. 29, 2001).[1]

We agree that the RICO claim was properly dismissed. Because it is predicated on mail and wire fraud, Federal Rule of Civil Procedure 9(b) requires that the fraud be pled with specificity. It was not. Moreover, the antitrust claim is also based on fraud - on misrepresentations in the information given to consumers and on misrepresentations in the information given to the independent financial publications. Although antitrust claims generally are not subject to the heightened pleading requirement of Rule 9(b), fraud must be pled with particularity in all claims based on fraud - "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b) (emphasis added). Fraud is the basis for the antitrust violation alleged here. In paragraph 18 of the Amended Complaint, plaintiffs aver that the banks "fraudulently and artificially inflated the 'prime rate' published in the outside indexes by falsely reporting the Bank's individual prime rates to the various publications. . . . the 'prime rate' published by the outside indexes remained artificially high and the prime plus interest rates on the consumer credit instruments were fraudulently inflated." (emphasis added). Because, as in the RICO claim, plaintiffs' allegations of fraud did not comply with Rule 9(b), the

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[1] Plaintiffs also allege violations of the New Jersey Consumer Fraud statute, 56:8-2 et seq., and the New Jersey common law of contracts. Having dismissed all the federal claims, the District Court dismissed these claims for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995).

antitrust claim would properly have been dismissed on these grounds.[2]

Finally, we agree with the District Court's denial of leave to amend. Plaintiffs' statements at oral argument and their briefs both before the District Court and before us make it clear that granting leave to amend would be futile. We will, therefore, affirm the judgment of the District Court.

I. Facts and Procedural History

On January 14, 2000, Hing and Debra Lum filed a complaint in the United States District Court for the District of New Jersey on behalf of themselves and of a purported class of similarly situated individuals who borrowed money from the defendant banks from April 22, 1987, to the present. The purported class was not certified prior to dismissal of the complaint. The defendants in the suit are twelve of the country's largest banks and one hundred unnamed individuals. On April 6, 2000, the plaintiffs filed an Amended Complaint adding Gary Oriani as a plaintiff. The Amended Complaint alleges that defendants violated RICO, the Sherman Antitrust Act, and New Jersey law by the manner in which they fixed the "prime plus" interest rate. Prime plus interest rates are tied to the "prime rate" as it is defined by the lender or by an outside index reported in a major financial publication. These publications in turn develop their indices from the prime rates reported by leading financial institutions, including defendant

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[2] Although the allegations of conspiracy in the Amended Complaint are somewhat conclusory, we do not agree with the District Court's position that they do not meet the pleading requirements of Fed. R. Civ. P. 8(a).

banks. At the heart of the Amended Complaint are the following allegations:

> 17. At some point in time prior to the Class Period, the Bank Defendants formulated and carried out a plan, scheme and conspiracy to fix and control the "prime rate" published by the outside indexes. Because these prime rate indexes had been incorporated into thousands of existing financial instruments as well as into new financial instruments written by the Banks, control of the prime rate published in the outside indexes would enable the Banks to effectively raise interest rates unilaterally on these credit instruments, and in so doing increase their income and profits by millions, if not billions of dollars on an annual basis.
>
> 18. During the Class Period, while maintaining an appearance of following a prime rate set by neutral forces, the Banks entered into a plan, scheme, conspiracy and course of conduct designed to fraudulently and artificially inflate the "prime rate" published in the outside indexes by falsely reporting the Bank's individual prime rates to the various publications. To effectuate this scheme, the Banks reported as their prime rates, rates far in excess of the rates the Banks actually charged to their largest and most creditworthy customers. As a result of this plan, scheme, conspiracy and course of conduct, the "prime rate" published by the outside indexes remained artificially high and the prime plus interest rates on the consumer credit instruments were fraudulently inflated.

(emphasis added).

The Amended Complaint then identifies three financial transactions pursuant to which the named plaintiffs obtained financing at a "prime plus" interest rate. The plaintiffs did not attach the agreements documenting these three transactions, but the defendants provided copies of the agreements in support of their motion to dismiss.[3] First, Hing and Debra

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[3] While plaintiffs did not attach this credit agreement to the complaint, they do not dispute that the District Court properly considered the agreement. In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). A document forms the basis of a claim if the document is "integral to or explicitly relied upon in the complaint." *Burlington Coat Factory*, 114 F.3d at 1426 (emphasis omitted). The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document. *See Pension Benefit Guar. Corp.*, 998 F.2d at 1196. Further, considering such a document is not unfair to a plaintiff because, by relying on the document, the plaintiff is on notice that the document will be considered. *See Burlington Coat Factory*, 114 F.3d at 1426. In the present case, there is no dispute that the credit agreements are integral to and relied upon in the complaint.

It should be noted that, under this standard, the District Court improperly took judicial notice of Hing Lum's deposition testimony in a prior proceeding that he understands that the term prime rate does not mean the lowest rate available to a bank's most creditworthy customers. While a prior judicial opinion constitutes a public record of which a court may take judicial notice, it may do so on a motion to dismiss only to establish the existence of the opinion, not for the truth of the facts asserted in the opinion. *See*

Lum obtained a home equity loan from Morris County Savings Bank, now First Union National Bank, in April 1987. This loan required the plaintiffs to pay interest at a rate of two percentage points above the prime rate, as reported in *The New York Times*. Second, plaintiff Debra Lum received credit cards from defendant Bank of America in 1990 and from Chase Manhattan Bank in 1991. These cards have interest rates tied to the prime rate reported in the *Wall Street Journal*. The Bank of America agreement defines this prime rate as "the base rate on corporate loans at large U.S. money center commercial banks." The Chase Manhattan agreement states that:

> For purposes of this Agreement, the Prime Rate as published in "Money Rates" table of *The Wall Street Journal* or any other newspaper of national circulation selected by us is merely a pricing index. It is not, and should not be considered by you to represent, the lowest or the best interest rate available to a borrower at any particular bank at any given time.

In connection with all three of these transactions, the defendant banks have sent to plaintiffs, through the U.S. mail, monthly statements regarding the prime rate.

On May 5, 2000, defendants moved to dismiss the complaint. In their opposition to the motion, plaintiffs submitted a detailed RICO Case Statement pursuant to the

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Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410, 427 (3d Cir. 1999). Thus, "a court that examines a transcript of a prior proceeding to find facts converts a motion to dismiss into a motion for summary judgment." *Id.* at 427 n. 7. Nevertheless, since there are sufficient other grounds to support dismissal here, this error is not a basis for reversal.

Local Rules of the District of New Jersey. On November 29, 2001, following oral argument, the District Court granted defendants' motion to dismiss. Plaintiffs filed a timely appeal.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction over the federal RICO and antitrust claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. We have jurisdiction over the District Court's final order pursuant to 28 U.S.C. § 1291.

We exercise plenary review over a district court's dismissal of a complaint under Rule 12(b)(6). *Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 871 (3d Cir. 1992). We review a district court's denial of leave to amend for abuse of discretion. *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981).

III. Discussion

In considering a motion to dismiss, a court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences from those facts in favor of the plaintiffs. *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). A court may dismiss the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). In the present case, even accepting the allegations in the complaint as true and drawing every reasonable inference in favor of the plaintiffs, they have failed to adequately plead either a RICO or an antitrust cause of action.

A. RICO:

The plaintiffs have failed to adequately plead a RICO cause of action predicated on mail and wire fraud because their general allegations of fraud do not comply with Rule 9(b) and their specific allegations regarding particular transactions do not amount to fraud. The RICO statute provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). It is also unlawful for anyone to conspire to violate § 1962(c). *See* 18 U.S.C. § 1962(d). In order to plead a violation of RICO, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). A pattern of racketeering activity requires at least two predicate acts of racketeering. *See* 18 U.S.C. § 1961(5). These predicate acts of racketeering may include, inter alia, federal mail fraud under 18 U.S.C. § 1341 or federal wire fraud under 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1); *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 676 (3d Cir. 1988), *vacated on other grounds*, 489 U.S. 1049 (1989).

The federal mail and wire fraud statutes prohibit the use of the mail or interstate wires for purposes of carrying out any scheme or artifice to defraud. *See* 18 U.S.C. §§ 1341, 1343. "'A scheme or artifice to defraud need not be fraudulent on

its face, but must involve some sort of fraudulent misrepresentation or omission reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 528 (3d Cir. 1998) (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991)).

Where, as here, plaintiffs rely on mail and wire fraud as a basis for a RICO violation, the allegations of fraud must comply with Federal Rule of Civil Procedure 9(b), which requires that allegations of fraud be pled with specificity. *See Saporito*, 843 F.2d at 673. In order to satisfy Rule 9(b), plaintiffs must plead with particularity "the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). Plaintiffs may satisfy this requirement by pleading the "date, place or time" of the fraud, or through "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.* (holding that a plaintiff satisfied Rule 9(b) by pleading which machines were the subject of alleged fraudulent transactions and the nature and subject of the alleged misrepresentations). Plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation. *See Saporito*, 843 F.2d at 675; *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658-59 (3d Cir. 1998); *Klein v. General Nutrition Cos.*, 186 F.3d 338, 345 (3d Cir. 1999).

In the present case, the RICO cause of action consists of the following allegation of mail and wire fraud:

44. During the Class Period, within the meaning of 18 U.S.C. § 1962(c), the Defendants conducted and participated, directly and indirectly, in the conduct of the enterprises through the pattern of racketeering activity:

(a) During the Class Period, Defendants used the U.S. mails and/or interstate wire facilities in connection with accomplishing the fraudulent scheme described in this Complaint. Each such use of the U.S. mails or interstate wire facilities was for the purpose of executing and furthering the fraudulent scheme or conspiracy described in this Complaint. Each month during the Class Period, Defendants mailed thousands of bank statements, advertisements for credit cards, contracts and promotional materials containing the fraudulent stated and artificially inflated interest rates to Plaintiffs and the Class in furtherance of their fraudulent scheme. Each such act constituted a violation of 18 U.S.C. § 1341.

(b) During the Class Period Defendants transmitted or caused to be transmitted by means of wire communications in interstate or foreign commerce, writings, signs, signals, pictures or sounds for the purpose of executing a scheme or artifice to defraud the plaintiffs, or for obtaining money or property of the Plaintiffs and the Class by means of false or fraudulent pretenses, representations or promises as set forth in this Complaint in the allegations set forth above. Examples include interstate telephone calls and/or facsimile transmissions by prospective borrowers, seeking to promote borrowing allegedly tied to the "prime rate," or to collect interest charges and loan payments allegedly due in connection with

> borrowing on the financial and credit instruments tied to the "prime rate," as well as interstate telephone or wire transmissions of the Bank's prime rate to the publishers of the outside indexes. Each of these acts constitutes a violation of 18 U.S.C. § 1343.

The "fraudulent scheme described in the Complaint" refers to paragraphs 17 and 18 of the Amended Complaint which we have set out above in Part I.

The District Court properly ruled that these conclusory allegations do not satisfy Rule 9(b). They do not indicate the date, time, or place of any misrepresentation; nor do they provide an alternative means of injecting precision and some measure of substantiation into the fraud allegations because they do not identify particular fraudulent financial transactions. *See Seville*, 742 F.2d at 791. Nor do these allegations indicate which defendant(s) made misrepresentations to which plaintiff(s). *See id.*; *Saporito*, 843 F.2d at 675; *Rolo*, 155 F.3d at 658-59; *Klein*, 186 F.3d at 345.

Plaintiffs contend, however, that the District Court failed to address explicitly the fact that the factual background section of the Amended Complaint and the RICO Case Statement identify three specific allegedly fraudulent transactions - the mortgage with First Union, and the credit card transactions with Bank of America and Chase Manhattan, the dates of these transactions, and the names of the defendants who made alleged misrepresentations to particular plaintiffs.[4] Plaintiffs, citing *Michaels Building Co.*

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[4] In their brief, plaintiffs claim that the RICO Case Statement alleges that Oriani entered into an instant credit agreement with

v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988), and *Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd* 473 U.S. 606, 105 S. Ct. 3291, 87 L. Ed. 2d 437 (1985), argue that these allegations are sufficient to plead a RICO cause of action. In Michaels and Haroco, the Courts of Appeals for the Sixth and Seventh Circuits, respectively, held that complaints adequately pled RICO causes of action predicated on mail and wire fraud when they alleged that banks misrepresented in particular loan agreements that the prime rate is the interest rate charged by the banks to their most creditworthy commercial borrowers, although in fact the banks charged lower rates to some commercial borrowers. *See Michaels*, 848 F.2d at 677; *Haroco*, 747 F.2d at 385.

In the present case, however, the Amended Complaint fails to allege fraud in relation to the three identified transactions because, unlike *Michaels* or *Haroco*, the plaintiffs do not, and cannot, allege that any of the three purportedly fraudulent credit agreements define the term

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Bank of New York in March 1994. However, the RICO Case Statement only alleges that Bank of New York represented a certain interest rate tied to the prime rate on a particular date. It does not allege that Oriani entered into a credit agreement with Bank of New York, the date of the credit agreement, or the terms of the agreement (in particular what interest rate Oriani would pay). Plaintiffs did not submit the credit agreement that Oriani allegedly entered into with Bank of New York. Based on the representations of Oriani's counsel at oral argument before the District Court, Bank of New York conducted a search of its records but could not find a record of the agreement with Oriani. Nevertheless, Bank of New York submitted its standard Instant Credit Agreement from the period during which Oriani claimed he entered into an agreement with Bank of New York. This agreement merely defined the term "prime rate" as the rate reported in the *Wall Street Journal*.

"prime rate" as the lowest interest rate available to a bank's most creditworthy borrowers. *See id.*

In addition, plaintiffs make general claims that defendants misrepresented that the prime rate is the lowest rate charged to their most creditworthy customers. However, these allegations do not satisfy Rule 9(b) because they do not indicate the date, time, or place of the alleged misrepresentations, the financial transactions in connection with which these misrepresentations were made, or who made the misrepresentation to whom. *See Seville*, 742 F.2d at 791; *Saporito*, 843 F.2d at 675; *Rolo*, 155 F.3d at 658-59; *Klein*, 186 F.3d at 345. Plaintiffs also allege that, on February 4, 2000, and March 29, 2000, Citibank and First Union represented to the "class" that the prime rate was the rate charged to their most creditworthy commercial customers. However, plaintiffs do not allege that these representations were made to a named plaintiff, or that any particular individual entered into a financial transaction with this term. *See Rolo*, 155 F.3d at 659 (holding that, until a class is certified, a RICO action is one between the named plaintiffs and defendants, and the adequacy of the pleading must be analyzed with regard to the specificity of the fraud allegations relating to the named plaintiffs).

In order to counter their failure to cite specific instances of active misrepresentation that the prime rate is the lowest rate available to a bank's most creditworthy borrowers, the plaintiffs focus on omissions by defendants. They argue that the term "prime rate" is so generally understood to mean the lowest rate available to a bank's most creditworthy borrowers that the failure to disclose that some borrowers obtain loans with interest rates below the prime rate constitutes fraud.

We conclude to the contrary. Even drawing every reasonable inference in favor of plaintiffs, the meaning of the term "prime rate" is sufficiently indefinite that it is reasonable for the parties to have different understandings of its meaning. For example, more than twenty years ago, a congressional committee, in a staff report, described "prime rate" as a "murky, ill-defined term that rarely reflects the lowest rates available to corporate customers." *See* Staff of House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., An Analysis of Prime Rate Lending Practices of the Ten Largest United States Banks 3 (Comm. Print 1981). This lack of precision in the term "prime rate" has also been recognized by the courts. *See, e.g., Blount Fin. Serv. Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987) ("The fact that the parties take different positions under the contract as to the appropriate prime rate, or the fact that the defendant charged too high a 'prime rate' and thereby concealed or refused to disclose what the plaintiff considers the true prime rate called for under the contract, does not give rise to a valid claim for fraud."); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 527-28 (9th Cir. 1987) (opining that prime rate indicates the average cost of a loan because most loans are negotiated at interest rates above or below prime); *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 859 F. Supp. 97, 103 (S.D.N.Y. 1994), *aff'd*, 99 F.3d 401 (2d Cir. 1995) (holding that a lender does not commit the predicate act of mail fraud by omitting a definition of prime rate and charging some borrowers below the prime rate because "a decision to charge certain customers lower rates than others - a common occurrence in the banking industry - merely reflects the bank's greater confidence in the financial stability of those customers."). It is therefore unreasonable to infer that defendants' use of the equivocal term "prime rate" was reasonably calculated to deceive persons of ordinary prudence and comprehension into

believing that no borrower obtained an interest rate below the prime rate. Plaintiffs' claim boils down to a disagreement about the meaning of the term "prime rate." This disagreement does not rise to the level of fraud; at most, it alleges a contract dispute. *See Blount*, 819 F.2d at 152-53.

Moreover, the requirement of Rule 12(b)(6) that we draw every reasonable inference in favor of plaintiffs does not preclude us from reaching this result. Plaintiffs do not ask us just to infer that the term "prime rate" means the lowest rate available to defendants' most creditworthy borrowers. They ask us to conclude that this meaning is so universally accepted that it is the only possible meaning and that a reasonable person could not understand the term to mean anything else. In light of Wilcox and Blount, this is not a reasonable inference. *See Blount*, 819 F.2d at 151; *Wilcox*, 815 F.2d at 528. We conclude that the term "prime rate," in the context in which it was used here, is imprecise.

Furthermore, even if we were to have held it to be fraudulent to use the term "prime rate" without disclosing that some borrowers obtain financing below the prime rate, the defendants in this case clearly did disclose that some borrowers obtained financing below the prime rate. The 1991 credit card agreement between defendant Chase Manhattan and plaintiff Debra Lum states:

> For purposes of this Agreement, the Prime Rate as published in "Money Rates" table of *The Wall Street Journal* or any other newspaper of national circulation selected by us is merely a pricing index. It is not, and should not be considered by you to represent, the lowest or the best interest rate available to a borrower at any particular bank at any given time.

(emphasis added). Plaintiffs argue that the term "it" in the last sentence of the Chase Manhattan agreement refers to the term "index" in the preceding sentence, not the term "prime rate." This distinction is meaningless, however, because, according to the terms of the contract, the prime rate for purposes of the credit card agreement is the prime rate reported in the *Wall Street Journal*. Thus, the caveat applies equally to both rates.

Given the fact that one member of the RICO association-in-fact (alleged by plaintiffs to be the defendant banks plus the Reuters News Service, Dow Jones, Inc., *The New York Times*, and the *Wall Street Journal*) expressly stated in one of the three allegedly fraudulent credit agreements, relied upon by the plaintiffs, that the prime rate is not the lowest rate offered to the bank's most creditworthy customer, it would be difficult to conclude, as plaintiffs allege, that the defendants conducted an enterprise through a pattern of racketeering activity by making misrepresentations or omissions that were reasonably calculated to deceive persons of ordinary prudence and comprehension.

Plaintiffs, however, point to a representation in another of the three agreements, the credit card agreement between Debra Lum and Bank of America, in support of their fraud claim. They argue that the representation in this agreement - that the prime rate is "the base rate on corporate loans at large U.S. money center commercial banks" - is tantamount to defining the prime rate as the lowest rate available to a bank's most creditworthy borrowers. However, as with the term "prime rate," a person of ordinary prudence and comprehension would not conclude from this statement that no commercial borrowers obtain an interest rate below the base rate because nothing in the term "base rate" excludes the possibility of discounts for some customers. Indeed, as plaintiffs acknowledge in their opening brief, citing BLACK'S

LAW DICTIONARY 1191 (6TH Ed. 1990), "base rate" is "effectively equivalent" to "prime rate." *See also* Form FR 2028a/s, Fed. Res. Board, Prime Rate Supp. to Survey of Terms of Business Lending. As with the term "prime rate," because of the possibility of discounts, the term "base rate" may not mean the lowest possible rate.

We conclude, therefore, that plaintiffs have failed to plead fraud with particularity in their RICO claim so that the District Court properly dismissed it.[5]

B. Sherman Antitrust Act:

Similarly, since the Amended Complaint alleges that defendants carried out their antitrust conspiracy through fraud, plaintiffs have failed to state a cause of action under Section 1 of the Sherman Antitrust Act because of the defects in the fraud allegations discussed above. Generally, the pleading standard for Section 1 claims is the short and concise statement standard of Rule 8(a). In Poller v. Columbia Broad. Sys., the Supreme Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962); *see also Hospital Bldg. Co. v. Trustees*, 425

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[5] Having correctly found that plaintiffs failed to adequately plead a substantive RICO claim under 18 U.S.C. § 1962(c), the District Court properly dismissed the RICO conspiracy claim under 18 U.S.C. § 1962(d). "Any claim under section 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient." *Lightning Lube, Inc. v. WITCO Corp.*, 4 F.3d 1153, 1192 (3d Cir. 1993).

U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976) ("In antitrust cases, . . . dismissal prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."). Likewise, in *Knuth v. Erie-Crawford Dairy Coop*, this Court stated that "we should be extremely liberal in construing antitrust complaints." 395 F.2d 420, 423 (3d Cir. 1968).

We have, however, recognized that "'while antitrust complaints are not subject to especially stringent pleadings, see *Knuth,supra*, neither are they exempt from the federal rules.'" *Pennsylvania v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir. 1988) (quoting *Sims v. Mack Truck Corp.*, 488 F. Supp. 592, 608 (E.D. Pa. 1980)).

Because plaintiffs allege that the defendants accomplished the goal of their conspiracy through fraud, the Amended Complaint is subject to Rule 9(b). *See* Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." (emphasis added)). Plaintiffs, nevertheless, pointing to paragraph 17 of the Amended Complaint, argue that their antitrust claim merely alleges that defendants conspired to set an artificially high floor on interest rates by agreeing to raise the prime rate, and that allegations of misrepresentations regarding the prime rate only go to their RICO claim. In paragraph 17, the Amended Complaint alleges that defendants "formulated and carried out a plan, scheme and conspiracy to fix and control the 'prime rate' published by the outside indexes."

This paragraph of the Amended Complaint cannot, however, be read in isolation. *See Chabal v. Reagan*, 822 F.2d 349, 357 (3d Cir. 1987). The very next paragraph of the Amended Complaint makes clear that plaintiffs are alleging

that the defendants carried out this plan, scheme, and conspiracy through fraud:

> 18. During the Class Period, while maintaining an appearance of following a prime rate set by neutral forces, the Banks entered into a plan, scheme, conspiracy, and course of conduct designed to fraudulently and artificially inflate the "prime rate" published in the outside indexes by falsely reporting the Bank's individual prime rates to the various publications. To effectuate this scheme, the Banks reported as their prime rates, rates far in excess of the rates the Banks actually charged to their largest and most creditworthy customers. As a result of this plan, scheme, conspiracy and course of conduct, the "prime rate" published by the outside indexes remained artificially high and the prime plus interest rates on the consumer credit instruments were fraudulently inflated.

(emphasis added). In short, the fact that the fraud is not identified in paragraph 17 of the Amended Complaint does not rule out that fraud is part of the antitrust allegation because paragraph 17 merely identifies the existence of a conspiracy to fix the prime rate, while paragraph 18 identifies how the rate fixing was accomplished - through fraud.

Because plaintiffs have alleged fraud as a basis for their antitrust cause of action, this claim is subject to the heightened pleading requirement of Rule 9(b). As discussed above, plaintiffs have failed to satisfy the requirements of Rule 9(b) with regard to their theory that defendants misrepresented that the prime rate would be the lowest rate available to their most creditworthy customers. They have also failed to particularize how false information on their

"prime rate" was sent to the financial publications for inclusion in the independent indices. They have not set out who sent what information to whom or when it was sent. Nor have they particularized by how many points the prime rate was falsely reported or whether there was any consistency among the defendant banks in the amount by which the prime rate was falsely reported. We conclude, therefore, that plaintiffs have not adequately pled an antitrust claim predicated on fraud.

C. Leave To Amend:

Can plaintiffs cure the deficiencies in the Amended Complaint by further amendment, either by providing particulars of the fraudulent conduct or by dropping the allegations of fraud? The Federal Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The District Court denied the request to amend on the basis that amendment would be futile.

We agree that it is clear from the statements in plaintiffs' briefs and at oral argument both before the District Court and before us that leave to amend would be futile. Plaintiffs cannot allege sufficient facts to support fraud in either the RICO or the antitrust claims. At oral argument, plaintiffs did not identify any additional allegations of fraud related to other financial transactions, or of other misrepresentations made in connection with the three identified transactions, that they would include in a Second Amended Complaint. Having examined the contracts from the three purportedly fraudulent transactions, it is clear that there are no further particulars of fraud in these transactions to set out and that granting leave to amend would be futile.

Similarly, permitting plaintiffs to amend their antitrust claim to remove the fraud allegation would be futile. They will have no additional information to provide here either. The only alternative basis for the antitrust claim that plaintiffs propose is a claim of conscious parallelism. As plaintiffs' attorney stated at oral argument:

> what we believe at this time is the basis of the claim, that we can assert in good faith is based on conscious parallelism, and it might very well be that during discovery, we will be able to establish that there were actual meetings and direct discussions.

This statement, viewed in light of the record before the court, is not sufficient to establish conscious parallelism. "The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action." *Bogosian*, 561 F.2d at 446. We have identified two such circumstances, known as "plus factors": 1) where defendants acted in contradiction of their own economic interests, and 2) where there is satisfactory demonstration of a motive to enter into an agreement. *See id.*; *Venzie Corp. v. United States Mineral Prod.*, 521 F.2d 1309, 1316 (3d Cir. 1975). Since conscious parallelism is an evidentiary rule that relates to how a plaintiff may prove the existence of an agreement, a plaintiff need not allege the existence of these plus factors in order to plead an antitrust cause of action. *See Bogosian*, 561 F.2d at 446 (holding that plaintiffs adequately pled an antitrust cause of action where they alleged a combination and that the defendants entered into parallel contracts with tying agreements).

In the present case, however, granting plaintiffs leave to plead conscious parallelism would be futile because plaintiffs do not allege, or seek to amend their complaint to allege, that defendants engaged in consciously parallel pricing as to the final interest rate that defendants charged consumers. Indeed, the Amended Complaint alleges that the Chase Manhattan Advantage Credit agreement offered an interest rate of 6 percentage points above the prime rate (or 5 percentage points above the prime rate if the customer had a Chase Manhattan banking relationship), but Citibank offered an interest rate of 1.65 percentage points above the prime rate. In addition, in their RICO Case Statement, plaintiffs allege that the following banks offered the following interest rates on the following credit cards through March 29, 2000:

Percentage Points Above Prime

Bank of America:

Visa Classic 2.9

Visa Gold 2.9

Standard Mastercard 2.9

Bank One

Visa OneCard Platinum (for purchase) 6.9

CitiBank

Citi Platinum Select 1.65

Citi Advantage Card 9.9

First Union

Visa Classic 7.9

Visa Gold 6.4

Visa Platinum 4.9

US Bank

WorldPerks Visa Card 9.75

Wells Fargo

Proven Credit Standard/Platinum MasterCard 9.4

Preferred Proven Credit Standard/Platinum

MasterCard 7.4

Premium Credit Standard/Platinum MasterCard 4.0

Standard Mastercard 7.4

Further, according to the RICO Case Statement, some defendants offered prime plus interest rates where the percentage points above the prime rate varied. The following banks offered the following interest rates on the following credit cards through March 29, 2000:

Percentage Points Above Prime

Bank of America

Visa Classic 2.9 to 12.9

Standard Mastercard 2.9 to 12.9

Visa Gold 2.9 to 12.9

Visa Platinum 7.9 to 12.9

Key Bank

Variable Rate Gold Visa1.99 to 13.99

Variable Rate Gold MasterCard 1.99 to 13.99

Variable Rate Classic Visa 1.99 to 13.99

Variable Rate Classic MasterCard 1.99 to 13.99

US Bank

Visa Classic 2.9 to 8.9

Visa Platinum 1.9 to 8.9

Still other defendants offered incentives. For example, Bank One offered a credit card with an introductory rate of 2.9% for the first six months, followed by a rate of 6.9 percentage points above the prime rate (for purchases). Chase Manhattan offered a credit card with a fixed rate of 3.99% for the first nine months, followed by a rate of 8.49 percentage points above the prime rate (9.49 percentage points for non-preferred customers). Bank of New York offered a credit card with an introductory rate of 5.99% for nine months, followed by a fixed rate of 13.49% for balances greater than or equal to $2,500, or 15.49% for balances less than $2,500 - or a customer could elect a variable rate after the first month of 5.49 percentage points above the prime rate for balances

greater than or equal to $2,500, or 7.49 percentage points above the prime rate for balances less than $2,500.

Similarly, the RICO Case Statement alleges that the following banks offered the following interest rates on lines of credit:

Percentage Points Above Prime

Chase Manhattan Advantage Credit 6

First Union Cash Reserve Credit (New York) 9.5

Key Bank Preferred Line of Credit (New York) 5.49

PNC Unsecured Line of Credit A competitive rate

Bank of New York EquityLink Line of Credit 0[6]

The only reasonable conclusion that can be drawn from these figures is that there was price competition as to the final interest rate on credit cards and lines of credit. *See Hishon*, 467 U.S. at 73.

Plaintiffs argue that they do not have to allege conscious price parallelism as to the actual interest rate charged to customers because their allegations of conscious price parallelism as to the prime rates is sufficient to state an antitrust cause of action. In support of this argument, plaintiffs cite several cases that recognize that an agreement to artificially inflate the base rate from which negotiations

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[6] The Bank of New York EquityLink Line of Credit had an introductory fixed rate of 5.9% for the first six months.

begin can violate the antitrust laws by causing consumers to pay more than they would absent an agreement to inflate the base rate. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517-18 (S.D.N.Y. 1996); *In re Indus. Diamonds Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 578 (E.D. Pa 1984); *In re Glassine and Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 306 (E.D. Pa. 1980). We need not decide whether an actual agreement to artificially raise a base price violates antitrust laws because that issue is not before us. Rather, the issue before us is whether we reasonably can infer from plaintiffs' factual allegations of parallel base pricing that defendants agreed to inflate the interest rates charged to consumers and small businesses.

The Supreme Court and this Court already have decided this issue in the negative. *See Brooke Group LTD v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227,, 113 S. Ct. 2578 235-36, 125 L. Ed. 2d 168 (1993); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 128 (3d Cir. 1999). In *Brooke Group* and *In re Baby Food Antitrust Litigation*, the plaintiffs argued that an inference of an agreement to artificially inflate prices could be drawn from evidence of consciously parallel list prices. *See id.* Both the Supreme Court and this Court rejected this argument, holding that the relevant inquiry for purposes of determining if an agreement to inflate prices can be inferred from consciously parallel pricing is whether there is consciously parallel pricing in the final price consumers pay, not whether there is conscious parallelism in the list price from which negotiations for the final price begins. *See id.* As we stated in *In re Baby Food Litigation*:

> In an industry with hundreds of products and a pervasive policy of allowing discounts and promotional allowances to purchasers, . . . charts and

> reports focusing on list prices rather than transactional prices have little value. "Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regular means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supra competitive pricing from data that reflect only list prices." *Brooke Group*, 509 U.S. at 236.

166 F.3d at 128 (emphasis in original).

While *Brooke Group* involved judgment as a matter of law and *In re Baby Food Antitrust Litigation* involved summary judgment, assuming the factual allegations are true in the present case and drawing every reasonable inference in favor of plaintiffs, the plaintiffs contend that they can allege that there is price parallelism in setting the prime rate. We can see, however, from the information provided to the District Court by the plaintiffs that, due to discounts and competition regarding how many percentage points above the prime rate that banks may charge, there is not price parallelism in the final interest rate charged to consumers. Under these circumstances, in light of *Brooke Group* and *In re Baby Food Antitrust Litigation*, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Therefore, granting leave to amend would be futile.

IV. Conclusion

For the reasons stated above, we will affirm the judgment of the District Court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO: 00-223(FSH)

[Filed November 29, 2001]

HING Q. LUM and DEBRA LUM, individually and on behalf of all persons similarly situated, Plaintiffs,	)
v.	)
BANK OF AMERICA; CITIBANK, N.A.; CHASE MANHATTAN BANK; MORGAN GUARANTY TRUST CO.; FIRST UNION NATIONAL BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK, N.A. THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; and JOHN DOES 1 THROUGH 100, Defendants.	)

OPINION AND ORDER

HOCHBERG, District Judge

Presently before the Court is a motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), filed jointly

by defendants Bank of America (hereinafter "Bank of America"), Citibank, N.A. ("Citibank"), Chase Manhattan Bank ("Chase Manhattan"), Morgan Guaranty Trust Co. ("Morgan Guaranty"), First Union National Bank ("First Union"), Wells Fargo Bank, N.A. ("Wells Fargo"), Fleet Bank ("Fleet"), PNC Bank, N.A. ("PNC"), The Bank of New York ("Bank of New York"), Key Bank, Bank One, and U.S. Bank (or collectively, "defendant banks"). Also before the Court is Defendant Bank of America's Motion to Compel Arbitration of the Claims asserted by Plaintiff Debra Lum.

BACKGROUND

This case involves claims by plaintiffs Hing Q. Lum ("Hing Lum") and Debra Lum ("Debra Lum"), as well as a purported class of persons similarly situated, against twelve defendant banks and one hundred unnamed persons, alleging violations of the Sherman Anti-Trust Act, 15 U.S.C. § 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); conspiracy to violate RICO, 18 U.S.C. § 1962(d); the New Jersey Consumer Fraud statute, 56:8-2 et seq.; and common law claims based upon breach of contract. The facts as alleged in Plaintiffs' complaint are summarized below.

Plaintiffs purport to represent a class of all persons who borrowed money and paid interest pursuant to a loan agreement, financial or credit instrument, or credit card agreement with interest stated at a rate tied to the "prime rate," at some point from April 22, 1987 through the present. The "prime rate" used to identify class members is defined either by the lender or by the New York Times, Wall Street Journal, Reuters, or some other "outside index." Plaintiffs and other class members are consumers and small businesses who borrowed money from the defendant banks at interest

rates that were represented to be tied to the "prime rate," which Plaintiffs claim that they understood to be the lowest rate offered by banks or as the rate offered to the banks' most credit-worthy customers. Plaintiffs Hing Lum and Debra Lum jointly entered into a home equity loan with Morris County Savings Bank, now First Union, in April 1987. Pursuant to that loan agreement, First Union extended credit up to a fixed credit limit on a "prime plus" home equity loan, with an interest rate to be established and adjusted monthly at two percentage points above the "prime rate," as reported in the New York Times.[1] In addition, Debra Lum claims that she was issued credit cards from Bank of America in 1990 and from Chase Manhattan in 1991 which charge "prime plus" interest rates tied to the prime rate as published in financial publications.

The Lums received monthly statements from First Union home equity loan through the U.S. mail. Debra Lum received written monthly credit card statements from Bank of America, Chase Manhattan, Fleet, and Bank One, through the U.S. mail.

STANDARD OF REVIEW

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents upon which the plaintiff's claims are based. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042, 114 S. Ct. 687, 126 L. Ed. 2d 655

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[1] None of the loan or credit agreements to which Plaintiffs refer were attached to the complaint.

(1994); *see also In re Donald Trump Casino Securities Lit.*, 7 F.3d 357, 368 n.9 (3d Cir. 1993); *cert. denied, sub nom.*, *Gollomp v. Trump*, 510 U.S. 1178 (1994). Motions to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action result in a determination on the merits at an early stage of a plaintiff's case. *See Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). As a result, "plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." *Id.* In order to grant a 12(b)(6) motion to dismiss, the court must find that the plaintiff will be unable to prevail even if the plaintiff proves all the allegations in the complaint. The court's decision must be based solely on the legal sufficiency of the complaint. *See id.*

DISCUSSION

I. First Count: Anti-Trust Claim

The Sherman Act states, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Plaintiffs claim that Defendants have engaged in unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of § 1 of the Sherman Act. Plaintiffs maintain that they were defrauded by the Defendant Banks in that the "prime-rate" they received was not actually "prime," and that "prime-rate" denotes the lowest rate banks offer to their largest and most credit-worthy customers. They assert that Defendants conspired to report artificially high rates to news services, in order to create an artificially high published rate, and thus defraud the public.

In order to plead a conspiracy, allegations must be pled with some specificity. While Plaintiffs are correct in their argument that the pleading requirements of rule 9(b) do not apply to a conspiracy claim under the *Sherman Act*, Plaintiffs are wrong in asserting that the same relaxed standards apply to conspiracy claims as to all non-fraud claims. The Third Circuit has made clear that "'only allegations of conspiracy which are particularized . . . will be deemed sufficient.'" *Pennsylvania ex rel. Zimmerman*, **836 F.2d 173, 181 (3rd Cir. 1988)**(quoting *Garshman v. Universal Resources Holding, Inc.*, 641 F. Supp. 1359 (D.N.J.,1986)). "A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment." *Id.* at 182.

Plaintiffs have failed to plead conspiracy even with the relaxed degree of specificity required. Instead, Plaintiffs make bare, generalized allegations of conspiracy without providing any facts regarding the actual interaction between the alleged co-conspirators. The extent of Plaintiff's specificity is to state repeatedly that the Defendants "formulated and carried out a plan, scheme and conspiracy to fix and control the 'prime rate' published by the outside indexes." However, the amended complaint does not provide any fact detailing how and when this plan, scheme and conspiracy was carried out. Nor does the amended complaint provide any factual reference explaining any occurrence in which the Defendants acted together. Rather, the amended complaint contains conclusory statements. Likewise, the RICO case statement, discussed in the next section, is equally devoid of any particulars despite a local rule requiring specificity. In Garshman v. Universal Resources Holding, Inc., the Court stated that "the allegation of unspecified contracts with

unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act." 824 F.2d 223, 230 (3d Cir. 1987). Plaintiffs have likewise failed to meet the minimum standards for pleading a conspiracy in violation of the Sherman Act. Plaintiffs' anti-trust claim is therefore dismissed.

II Second Count: RICO Claim

1. Elements of a Civil RICO Violation

Plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 (c) and (d), as against each and every of the thirty-six (36) Defendants. Section 1962(c) provides that: "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern racketeering activity or collection of unlawful debt." Subsection (d) of that same statute makes it unlawful for any person to conspire to violate 18 U.S.C. § 1962 subsections (a) through (c). In order to survive the Defendants' motions to dismiss the RICO claim, Plaintiffs' complaint must adequately set forth the following elements of civil RICO: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L., v. Imrex Company, Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Additionally, Plaintiffs must allege that they have been injured in their business or property as a result of the alleged racketeering activity. *Id.*

A "pattern" of racketeering activity requires at least two predicate acts of racketeering. *See* 18 U.S.C. § 1961(5);

Sedima, S.P.R.L., 473 U.S. at 496 n.14. Section 1961 provides an exclusive list of those acts that can constitute racketeering activity for the purposes of pleading violation of RICO. *See Annulli v. Panikkar*, 200 F.3d 189, 199 (3d Cir. 1999). The predicate acts that Plaintiffs here rely upon in attempting to plead a violation of RICO are mail and wire fraud.

2. Failure to Plead Fraud with Particularity

Where plaintiffs allege mail and wire fraud as the basis of a RICO violation, the allegations of fraud must comport with the Fed.R.Civ.P. 9(b)[3] heightened pleading standard. *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666, 673 (3d Cir. 1988), *vacated on other grounds*, 489 U.S. 1049 (1989). To plead mail or wire fraud with sufficient particularity, Plaintiffs must "plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985). To satisfy the pleading requirement, plaintiffs may plead the specific conduct alleged to be fraudulent along with the "date, place and time" that the alleged fraud occurred or use some "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Id.* Vague or conclusory allegations of fraud will not survive a motion to dismiss. *In re*

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[3] Fed.R.Civ.P. 9(b) states in pertinent part that: "In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity."

Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997). Moreover, allegations that generally allege fraud as against multiple defendants, without informing each defendant as to the specific fraudulent acts he or she is alleged to have committed do not satisfy Rule 9(b). *See Mayor & Council of Borough of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1060 (D.N.J. 1993).

Plaintiffs' complaint and amended complaint both fail to provide the specific allegations of fraud. There is neither a description of the alleged conduct together with the "date, place and time" details, nor is there an alternate means of precision. The amended complaint makes conclusory allegations such as: "The members of the various Bank Defendants functioned as a continuing unit and shared a common purpose." In addition, Plaintiffs state that the news services "constitute an 'association in-fact enterprise.'" However, in neither the original complaint or the amended complaint are there any factual allegations to support such conclusory statements. Plaintiffs do not explain who decided to make the alleged association or when it was formed. Plaintiffs do not set-out the statements made or the specific dates of the allegedly wrongful acts. Indeed, Plaintiffs provide no detail at all.

In addition to the lack of detail in the complaint and the amended complaint, Plaintiffs failed to provide detail in the RICO case statement -- filed over seven months after the filing of the original complaint -- which should include sufficient detail to satisfy the 9(b) requirements. The RICO case statement instructs that the complaining party should, inter alia:

> Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO

> claim ... a. List the alleged predicate acts and the specific statutes which are allegedly violated; b. provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts; c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, provide the "circumstances constituting fraud or mistake [which] shall be stated with particularity." Fed. R. Civ. P. 9(b).

Nevertheless, for the third time in which Plaintiffs had an opportunity to provide sufficient detail of the alleged wrongful actions, Plaintiffs failed to do so. Plaintiffs' complaint represents precisely what the heightened pleading requirement is meant to protect against -- "spurious charges of immoral and fraudulent behavior." *See Seville*, 742 F.2d at 791. Plaintiffs' repeated failure to meet the heightened pleading standards of Rule 9(b) requires dismissal of their RICO claims as against each of the defendants. Leave to amend is not granted because the repeated failure to provide proper particularity leaves no room to believe that a fourth effort should be entertained. Moreover, extended oral argument failed to elicit any greater degree of particularity. All Plaintiffs proffer is a vague theory devoid of facts.

In addition to the entire complaint's failure to meet the particularity standard, the individual Plaintiffs' claims are even further flawed. Mr. Lum, whose complaint avers that he was misled about the meaning of the "prime rate," in fact has previously represented to the Court that he has great financial acumen. Moreover, the Court takes judicial notice of a 1991 deposition in which Mr. Lum admitted that he knew the meaning of "prime rate," and that Banks largest and most

credit-worthy customers can and do borrow at rates below prime. Judicial notice of a fact is proper where that fact is:

> not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). A Court may take judicial notice of a fact at any stage of a legal proceeding. Fed. R. Evid. 201(f).[4] The 1991 deposition rebuts Mr. Lum's allegation that he was misled as to the meaning the bank attributed to the term "prime rate," it also reveals that Mr. Lum's action may well be time-barred.[5] Mr. Lum is apparently providing two different courts two different versions of facts as they best suit his case. A party is not permitted to "play it fast and loose" with the courts, and the doctrine of judicial estoppel empowers courts to prevent a party from taking contrary factual positions in different judicial proceedings. *See*, *e.g.*, *Anjelino v. New York Times Co.*, 200 F.3d 73, 100 (3d Cir. 1999). Mrs. Lum was also a party to the earlier case in which her husband was a deponent and she does not claim to be unaware of his knowledge of the fact that certain bank

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[4] Parties are entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Fed. R. Evid. 201(e). The parties here have been heard on this issue.

[5] Civil Rico actions have a four year statute of limitations. *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 146 F. Supp. 2d 643, 663-64 (D.N.J. 2001). Mr. Lum took well over four years from 1991, when he testified about his knowledge regarding the term "prime rate," to file an action against the defendants.

customers regularly borrowed below prime rate. Moreover, Mrs. Lum signed contracts and received statements that made it quite clear what the definition of prime rate was. There is therefore no evidence to support Plaintiffs' own allegations of RICO violations and fraud. The RICO cause of action is dismissed.

III. Third Claim: Conspiracy to Violate RICO

Plaintiffs allege that Defendants conspired to violate RICO. However, where a substantive RICO claim fails, a claim alleging a conspiracy to violate RICO must also fail. *Lighting Lube Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993)(dismissing conspiracy claim because substantive claims of violation of RICO sections 1962(a), (b) and (c) were dismissed). *Cf. Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3rd Cir. 1996) (distinguishing Lighting Lube on grounds that where there was valid RICO claim, court held that plaintiff could assert conspiracy to violate RICO even if it was not plaintiff that was harmed by alleged RICO violations). Moreover, Plaintiffs have not alleged sufficient facts to demonstrate that there was a conspiracy and that each defendant participated in the conspiracy. Plaintiffs' claim of conspiracy to violate RICO is therefore dismissed.

IV. Counts Four and Five: New Jersey Consumer Fraud Act & Common Law Claims for Breach of Contract and Recission

A district court has supplemental jurisdiction over all claims so related to the federal claim as to be one case and controversy. 28 U.S.C. § 1367(a). However, a "district court[] may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* if -- (3) the district court has dismissed all claims over which it has original jurisdiction."

28 U.S.C. § 1367(c)(3); *see also*, *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3rd Cir. 1995)(explaining that in interests of judicial economy and comity, if federal causes of action are dismissed before trial, state claims should also be dismissed). Having dismissed all of Plaintiffs' federal causes of action, the Court now declines to exercise supplemental jurisdiction and, pursuant to 28 U.S.C. § 1367(c)(3), dismisses all state law claims for lack of jurisdiction, without prejudice to the right to replead in state court.

V Conclusion

Plaintiffs allegations lack not only the degree of specificity required under F.R.C.P. 9(b), but also the less exacting standard required for anti-trust claims. Plaintiffs have had ample opportunities to provide greater details in their allegations and have repeatedly failed to do so. Plaintiffs failure to allege the requisite detail is sufficient to convince this Court that all the federal claims should be dismissed. The State law claims are dismissed pursuant to the Court's declination to exercise supplemental jurisdiction absent a valid federal cause of action. Finally, Defendant Bank of America's Motion to Compel Arbitration is denied as moot.

IT IS on this 27th day of November 2001, hereby

ORDERED that Defendants Motion to Dismiss is **GRANTED.**

HON. FAITH S. HOCHBERG, U.S.D.J.

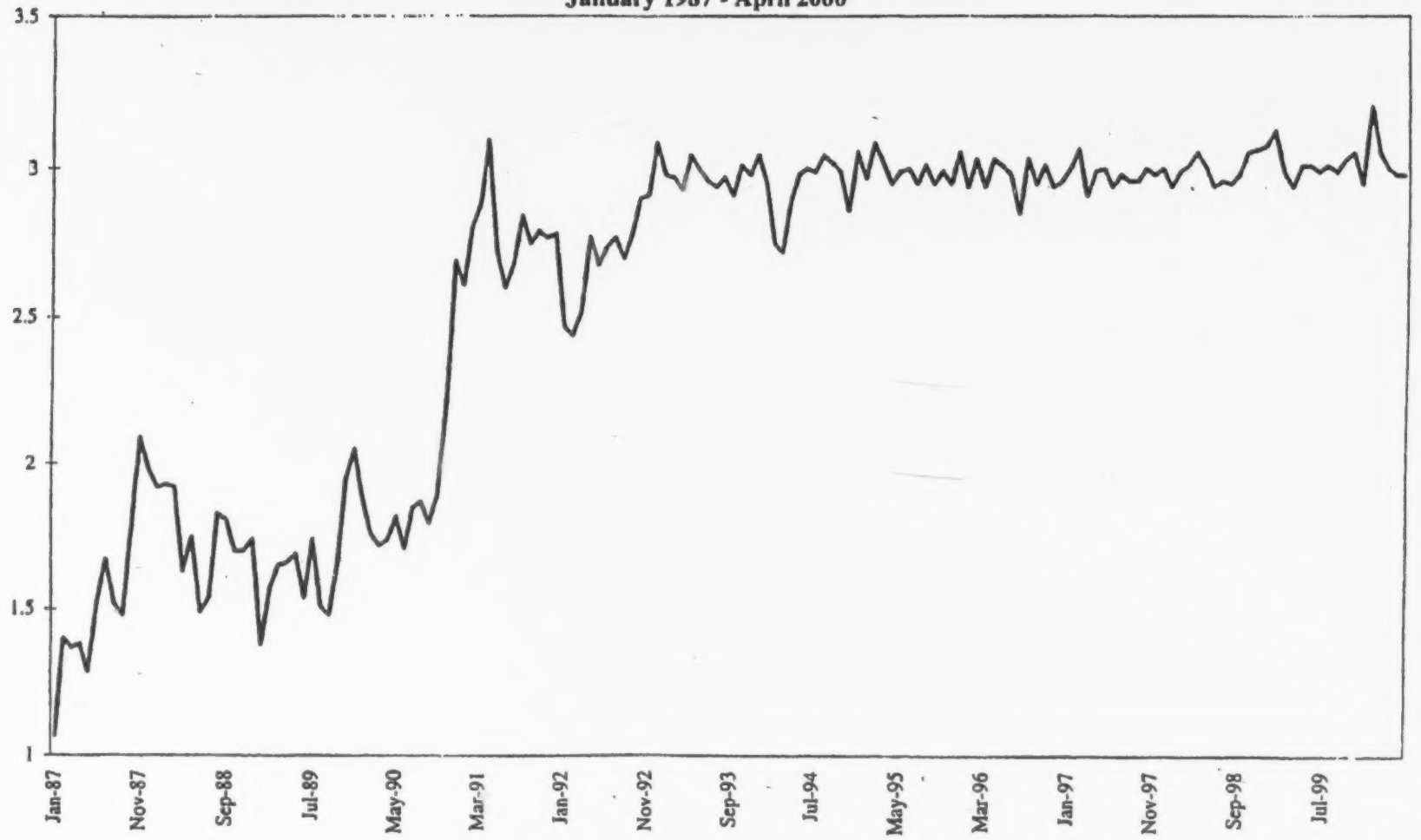
APPENDIX D

[Foldout Exhibit]

A326

Figure 2a

Spread between Prime Rate and Fed Funds Rates
January 1987 - April 2000



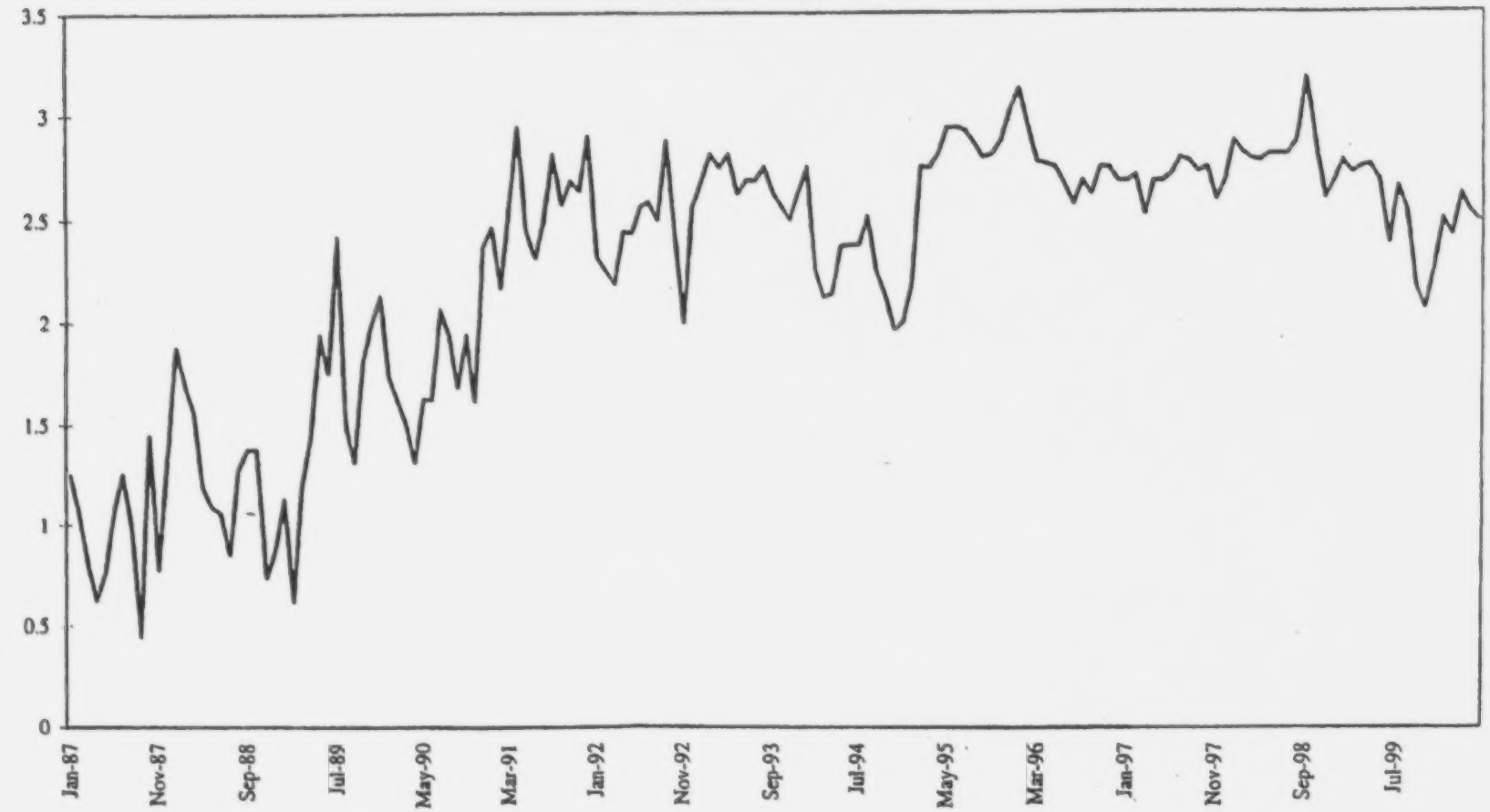
Source: Federal Reserve Board.

[Foldout Exhibit]

A327

Figure 2b

Spread between Prime Rate and 3 month Libor Rate
January 1987 - April 2000



Source: Federal Reserve Board und Bloomberg Financial Murkets.

APPENDIX E

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FOR THE THIRD CIRCUIT
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May 22, 2003

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RE: Lum v. Bank of America
No. 01-4348
Listed: Monday, June 2, 2003

Dear Counsel:

At the direction of the Court, counsel is hereby advised that they should be prepared to discuss the following issues at oral argument:

1. Does plaintiffs' anti-trust complaint, alleging financial fraud and misrepresentation involving prime rate based lending have to conform with Rule 9(b) of the Federal Rules of Civil Procedure, and

2. If so, does the complaint here so comply.

Very truly yours,
Marcia M. Waldron, Clerk

/s/_____
Eric Hernandez, Calendar Clerk
Direct Dial (267) 299-4956